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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960.

No. 203.

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

**BRIEF FOR APPELLANT ELI LILLY
AND COMPANY.**

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

**BRIEF FOR APPELLANT ELI LILLY
AND COMPANY.**

Opinions Below.

The opinion of the Supreme Court of New Jersey is reported in 31 N. J. 591, 158 A. 2d 528 (R. 47). The opinion of the Superior Court of New Jersey, Chancery Division, is reported in 57 N. J. Super. 291, 154 A. 2d 650 (R. 30).

Jurisdiction.

The judgment of the Supreme Court of New Jersey was entered on March 7, 1960 (R. 48). Notice of appeal was filed in that court on May 2, 1960 (R. 49). Probable jurisdiction was noted by this Court on October 17, 1960 (R. 52). Jurisdiction of this appeal rests on 28 U. S. C. §1257 (2)

since there is drawn in question the validity of a New Jersey statute under the Commerce Clause of the United States Constitution and the decision below was in favor of its validity.

Constitutional Provision and Statutes Involved.

Article 1, Section 8 of the Constitution of the United States: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. . . ."

The following sections of the New Jersey Revised Statutes are set forth in the Appendix hereto: Section 14:15-3, 4, 5, 6 and 7; Section 14:16-1; and Section 14:6-2.

Question Presented.

Is a state statute repugnant to the Commerce Clause (Article I, Section 8) of the Constitution of the United States when applied to deny to a foreign corporation the right to engage in interstate commerce in the state, and to deny it access to the courts of the state, unless and until it obtains from the state a certificate of authority and subjects itself to all the requirements and obligations incident to domestication?

Statement.

This suit was commenced by appellant in the Superior Court of New Jersey, Chancery Division, to enjoin appellee's violations of the New Jersey Fair Trade Act, N. J. Rev. Stat. 56:4-3, *et seq.* Appellant is an Indiana corporation which manufactures and sells pharmaceutical products. Appellant's products are manufactured entirely in the State of Indiana and are sold to wholesale distribu-

tors in interstate commerce throughout the United States, including the State of New Jersey (R. 27). Appellant does not sell to retailers. It maintains no warehouse or stock of goods in New Jersey nor does it own or lease any property there. All its sales to New Jersey distributors are made under contracts entered into in Indiana (R. 27).

Appellant's activity in New Jersey is limited to promotional and informational work by employees who do not accept orders for products (R. 27). Appellant employs a "District Manager" who leases an office in Newark for which he is reimbursed by appellant (R. 28). Appellant's name appears on the door of this office (R. 23). The District Manager supervises the work of 18 detail men whose function is to visit physicians, hospital personnel and pharmacists to acquaint them with, and to promote the use of, appellant's products (R. 29). They do not solicit or accept orders from anyone. Occasionally, as a service to a retail druggist, they may transmit to a wholesaler an order for appellant's products which the wholesaler may fill if it wishes. The detail men make available to the druggists free advertising and promotional material. Occasionally they examine the retailer's stocks and may recommend the enlargement of his available supply of appellant's products (R. 29).

As part of its nationwide program of promoting its trademarks, name and good will, appellant has entered into a number of contracts, made in Indiana, with New Jersey drug retailers by which the latter agree not to sell appellant's products at less than the prices established by appellant as permitted by the New Jersey Fair Trade Act, N. J. Rev. Stat. 56:4-3 *et seq.*, and the McGuire Act, 66 Stat. 632 (1952), 15 U. S. C. §45 (1958) (R. 1-2, 27, 41). Under these statutes, all retailers having notice of the prices so established are required to observe them. Appellant has obtained

more than 30 injunctions in New Jersey state courts against retailers who have willfully violated appellant's fair trade prices (R. 3-5).

The present suit was brought to enjoin fair trade violations by appellee, Sav-On Drugs, Inc., a New Jersey corporation operating retail drug stores in that state. Appellee moved to dismiss the complaint on the ground that appellant was a foreign corporation transacting business in New Jersey without a certificate of authority from the Secretary of State and was therefore barred by New Jersey Rev. Stat. 14:15-3 and 14:15-4 from suing in the courts of the state (R. 22). In opposition to this motion, appellant contended that the application of the New Jersey statute to it would conflict with the Commerce Clause of the United States Constitution since its business in New Jersey is entirely in interstate commerce (R. 34, 38).

The trial court granted the motion to dismiss, finding that appellant was transacting business in the state within the meaning of the statute, and that, despite the interstate character of this business, the statute was constitutional as applied to appellant (R. 34-41). On appeal the Supreme Court of New Jersey affirmed the judgment, resting its decision on the opinion of the lower court (R. 47). Because of the attack on the constitutionality of the New Jersey statute, the State of New Jersey, through its Attorney General, intervened on appeal pursuant to New Jersey court rules.

Summary of Argument.

I.

A. The decision below conflicts with the long-standing constitutional principle that foreign corporations cannot be required by a state to obtain its permission to engage in interstate commerce within the state. *Crutcher v. Kentucky*,

141 U. S. 47 (1891). State qualification statutes such as the New Jersey statute involved here, imposing conditions on the right to engage in interstate commerce and the right to sue in state courts in furtherance of that commerce, have always been held to constitute a regulation of commerce forbidden by the Commerce Clause. *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921); *Furst v. Brewster*, 282 U. S. 493 (1931).

Except for New Jersey, the states are unanimous in recognizing this fundamental limitation on their power. Even New Jersey respected the limitation until this case. American business concerns throughout the country have for many years formulated their policies and methods in reliance on the unequivocal adherence to this rule by this Court and the courts of the states. No showing has been made of any legitimate state interest which would warrant overruling a half-century of constitutional decisions.

B. The court below confused two entirely separate lines of constitutional precedents. It failed to recognize that the assertion of state power over the very right to engage in interstate commerce stands in an entirely different category from state police power regulation of matters vital to local health, safety or welfare but incidentally affecting interstate commerce. Regulation of the latter type is permitted if it does not unduly burden or discriminate against interstate commerce, but regulation or taxation of the right itself is completely beyond the power of the state. Compare *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938) with *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951). The very case relied on by the court below as rendering the principle of *International Textbook Co. v. Pigg*, *supra*, obsolete emphasized this distinction again and again. *Northwestern States*

Portland Cement Co. v. Minnesota, 358 U. S. 450, 458, 462, 463-464 (1959).

C. New Jersey has no legitimate need to apply the qualification statute to foreign corporations in interstate commerce. The need which gave rise to the statute in 1894, to acquire jurisdiction over foreign corporations otherwise immune from suit, has long since disappeared. State court jurisdiction over foreign corporations, even when engaged solely in interstate commerce, has been obtainable under the "presence" test since the decision in *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914). It is now even more easily obtained under the "minimum contacts" rule. *International Shoe Co. v. Washington*, 326 U. S. 310 (1945). The court below evidently considered the *International Shoe* case an authority for its decision here, but the important constitutional difference between subjecting foreign corporations to suit and requiring them to qualify to do interstate business was pointed out as long ago as 1914 in the *International Harvester* case.

The New Jersey statute does in fact burden interstate commerce. Qualification under it subjects foreign corporations in interstate commerce to state court suits which may not fall within the "minimum contacts" rule, such as suits by non-residents on causes of action arising outside the state. In addition, New Jersey tax regulations provide that a foreign corporation holding a certificate of authority to do business in the state automatically acquires taxable status for purposes of the corporate franchise tax.

If the states are permitted to impose their own conditions on the right to engage in interstate commerce, compliance with the varied and recurring requirements of state qualification statutes would result in cumulative burdens on corporations doing interstate business in numerous states.

II.

Appellees' contention that appellant is engaged in intrastate commerce in New Jersey raises a new argument and is in conflict with their position below which the court adopted. Accordingly, it need not be considered by this Court. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 434-35 (1907).

Even if the contention were timely, it would make no difference here. The present suit is for the protection of appellant's interstate business and, as shown by the *Sioux* and *Furst* cases, could not be barred even if appellant were in fact doing some business of an intrastate character.

In any event, appellant is engaged only in interstate commerce in New Jersey. It sells only to wholesale dealers in interstate commerce, and maintains no warehouse or stock of goods in the state. Its activity in New Jersey is limited to the promotional and informational work of appellant's detail men which is in aid of that interstate business and does not constitute the doing of a local business in New Jersey. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (1887); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 437 (1938); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959); *Ford Motor Co. v. FTC*, 120 F. 2d 175 (6th Cir. 1941).

ARGUMENT

I.

New Jersey Cannot Constitutionally Require Foreign Corporations to Qualify to Do Interstate Business in the State.

A. The Right to Engage in Interstate Commerce May Not Be Subjected to State-Imposed Conditions.

The court below disregarded the established constitutional rule that a foreign corporation cannot be required by a state to obtain permission to engage in interstate commerce within the state. While foreshadowed by even earlier cases, this rule has been a cornerstone of our constitutional law ever since *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

In the *Crutcher* case a Kentucky statute required agents of express companies not incorporated in Kentucky to obtain a license to do business within the state. An agent of a foreign corporation carrying on interstate business within Kentucky was convicted and fined for failure to obtain such a license. This Court reversed the conviction, holding that the licensing requirement was a "regulation of interstate commerce . . . a subject which belongs to the jurisdiction of the national and not the state legislature." (141 U. S. at 57) The Court added:

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their busi-

ness, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." (141 U. S. at 57)

This is a principle from which the Court has never deviated in the seventy years since *Crutcher* was decided, as the following brief review of subsequent decisions will show.

In *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910), on the authority of *Crutcher*, this Court reversed a Kansas decision barring suit by a foreign corporation in interstate commerce for failure to comply with a statute requiring foreign corporations to apply for a certificate of authorization to do business in the state. The textbook company, through an agent who maintained an office in the state, engaged in regular solicitation of students for correspondence courses which were mailed to the students from the company's main offices in Pennsylvania. While agreeing with the state supreme court that the corporation was "doing business" in Kansas, the Court held that the business was entirely in interstate commerce and that the statute, in imposing conditions upon the right of a corporation to do interstate business, "is a regulation of interstate commerce and directly burdens such commerce." (217 U. S. at 111). Commenting on the harshness of barring access to state courts, Mr. Justice Harlan reiterated the statement the Court had made in *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, 148 (1907):

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." (217 U. S. at 112).

That same year, on the authority of the *Pigg* case, this Court reversed *per curiam* two state court decisions which had held qualification statutes of Wisconsin and Vermont applicable to corporations engaged in interstate commerce. *International Textbook Co. v. Peterson, International Textbook Co. v. Lynch*, 218 U. S. 664 (1910). In the light of the attempt of the court below to distinguish the Kansas statute involved in the *Pigg* case as "more onerous" than the New Jersey statute involved here, it is significant that the Wisconsin statute invalidated in the *Peterson* case required even less than the New Jersey statute. Wisconsin required only the filing of the corporate charter, appointment of the Secretary of State as agent for service of process, and a filing fee of \$25.*

Two years later, when the Kansas courts attempted to bar four foreign corporations in interstate commerce from suing to set aside a fraudulent conveyance for failure to comply with the Kansas qualification statute, this Court again held that the Commerce Clause invalidated such an application of the statute. *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912).

Sioux Remedy Co. v. Cope, 235 U. S. 197 (1914), reversed a South Dakota decision which barred suit on an interstate transaction for failure of the foreign corporation to comply with a South Dakota statute requiring a foreign corporation to qualify not only to do business in the state but also to sue in state courts. The South Dakota court had held that while the state could not condition the right to make interstate

* Wisc. Stat. 1898, §1770 b. It is clear from the *Peterson* and subsequent cases that the Court has considered all qualification statutes, regardless of their particular provisions, unconstitutional as applied to corporations in interstate commerce. This is the interpretation given the decisions by textbook commentators. E.g., 17 FLETCHER, CORPORATIONS 504 (rev. vol. 1960); RESTATEMENT, CONFLICT OF LAWS §175 (1934).

sales on compliance with the statute, it could so condition the right to sue in state courts for the purchase price. In holding to the contrary, this Court stated that a corporation engaged in interstate commerce "may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce", including suits to enforce rights arising from interstate commerce. While recognizing that a state can regulate the procedure of its courts, such as requiring security for costs and the like, the Court held that the conditions imposed "have no natural or reasonable relation to the right to sue which they are intended to restrict." (235 U. S. at 203-04, 205).

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921), a foreign corporation which had contracted in Kentucky to purchase wheat there for shipment to Tennessee had been barred by the Kentucky courts from suing to enforce the contract by reason of its failure to comply with the state qualification statute. This Court reversed, holding the application of the statute invalid because the "transaction was a part of interstate commerce; in which the plaintiff lawfully could engage without any permission from the state of Kentucky." (257 U. S. at 292-93)

In *Furst v. Brewster*, 282 U. S. 493 (1931) a partnership acting for an unqualified foreign corporation had contracted to ship goods to Brewster in Arkansas for sale on the local market. In a suit to recover the agreed price from Brewster, the state court had found that the contract was one of agency, rather than of sale, and that the foreign corporation was therefore engaging in local commerce through its agent Brewster, thus making the contract unenforceable under the qualification statute. On appeal, this Court held that even if Brewster were the agent of the foreign corporation in making local sales, the contract between Brewster and the foreign corporation was in inter-

state commerce and enforceable despite the corporation's failure to qualify. The *Furst* case makes clear that a foreign corporation may not be denied access to state courts to enforce rights arising from interstate commerce even if it is also doing intrastate business. Indeed, the *Crutcher* case had already held, and the *Pigg* case reiterated, that a state qualification statute imposing conditions on the right to transact interstate business is unconstitutional even though the particular corporation also does some intrastate business (141 U. S. at 59; 217 U. S. at 110).

These cases, from *Crutcher* to *Furst*, dealing with a variety of statutes and diverse factual situations, have established as bedrock constitutional law that state qualification statutes cannot condition the right to engage in interstate commerce or to bring suits in state courts in furtherance of that commerce. Unlike other Commerce Clause cases which have caused sharp division in this Court, the cases holding qualification statutes inapplicable to interstate business have not produced substantial disagreement or dissent. Most were unanimous decisions on the constitutional issue and the last one, *Furst v. Brewster*, carried the assent of Justices who in cases of state action having less fundamental impact on interstate commerce did not hesitate to defend state regulation challenged under the Commerce Clause. *E. g.*, *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927) (Holmes, Brandeis and Stone, JJ., dissenting).

The continuing validity of the principle that qualification statutes cannot be applied to interstate commerce has been expressly recognized in cases which permitted the licensing of individuals and corporations engaged in localized intrastate businesses having some relation to interstate or foreign commerce. *California v. Thompson*, 313 U. S. 109 (1941); *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944).

In the *Thompson* case, the Court sustained a California statute providing for licensing of local transportation agents who arranged for intrastate or interstate transportation. The Court, overruling the *Di Santo* decision, pointed out that the agents to whom the statute applied were not themselves engaged in interstate transportation and distinguished the *Crutcher* and *Dahnke-Walker* cases as involving the imposition of statutory conditions on the right to engage in interstate commerce. (313 U. S. at 114-15)

The Court again emphasized this distinction in the *Union Brokerage* case, which upheld the Minnesota qualification statute as applied to a foreign corporation doing a customs brokerage business entirely within the state. The Minnesota Supreme Court had recognized that the qualification statute was inapplicable to corporations engaged in interstate or foreign commerce. It found, however, that the corporation's brokerage business was intrastate, as the corporation had its office and all its records in the state, conducted all its business entirely within the borders of the state, and "had nothing whatever to do with the actual importation or exportation of articles of commerce" (215 Minn. 207, 220, 9 N. W. 2d 721, 727). In affirming, this Court repeatedly called attention to the fact that the corporation's business was localized in the state and distinguished the *Pigg* and *Dahnke-Walker* cases as involving corporations engaged in "unitary interstate" transactions across state lines. (322 U. S. at 208, 210, 211)

Until the decision below there has been unanimous recognition by the states themselves of the constitutional bar against applying qualification statutes to foreign corporations engaged only in interstate commerce. Of all the 50 states New Jersey stands alone. Indeed, New Jersey itself previously recognized its lack of the power it here asserts. *Federal Schools, Inc. v. Sidden*, 14 N. J. Misc. 892,

188 Atl. 446 (1936). In 16 states the constitutional limitation is expressed in the statute itself.* All other states which have spoken on the subject have required by judicial decision that their qualification statutes be construed as incorporating the limitation.**

- * Alaska—Comp. Laws Ann. §36-2A-141 (1958).
- California—Corporations Code §6403
- Connecticut—Gen. Stat. §33-397 (Supp. 1959)
- Delaware—Code Ann., tit. 8, §§341, 343, 344 (1953)
- Hawaii—Rev. Laws §§174-1, 174-7.5 (Supp. 1957)
- Iowa—Code Ann. §496 A. 103 (Supp. 1960)
- Maine—Rev. Stat. Ann. ch. 53, §127 (1954)
- Maryland—Ann. Code art. 23, §§ 88, 90, 91 (1957)
- North Carolina—Gen. Stat. §55-131 (1960)
- North Dakota—Rev. Code §10-2201. (Supp. 1957)
- Ohio—Rev. Code Ann. §1703.02 (Page 1954)
- Oregon—Rev. Stat. ch. 57 §57.655 (1959)
- Pennsylvania—Stat. Ann. tit. 15, §2852-1001 (1958)
- Tennessee—Code Ann. §48-902 (1955)
- Texas—Bus. Corp. Act, art. 8.01 (1956)
- Washington—Rev. Code §23.52.020 (1958)
- ** Alabama—*Gilliland & Echols Farm Supply & Hatchery v. Credit Equip. Corp.*, 269 Ala., 112 So. 2d 331 (1959).
- Arizona—*Weber Showcase & Fixture Co. v. Co-Ed Shop*, 47 Ariz. 415, 56 P. 2d 667 (1936).
- Arkansas—*Sillin v. Hessig-Ellis Drug Co.*, 181 Ark., 386, 26 S. W. 2d 122 (1930).
- Colorado—*Savage v. Central Elec. Co.*, 59 Colo. 66, 148 Pac. 254 (1915).
- Florida—*Stevens-Davis Co. v. Stock*, 141 Fla. 714, 193 So. 745 (1940).
- Georgia—*Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S. E. 120 (1923).
- Idaho—*New Idea Spreader Co. v. Satterfield*, 45 Idaho 753, 265 Pac. 664 (1928).
- Illinois—*Air Conditioning Training Corp. v. Majer*, 324 Ill. App. 387, 58 N. E. 2d 294 (1944).
- Indiana—*Vilter Mfg. Co. v. Evans*, 86 Ind. App. 144, 154 N. E. 677 (1927).
- Kentucky—*Webb v. Knoxville Glass Co.*, 217 Ky. 225, 289 S. W. 260 (1926).
- Louisiana—*Reynolds Metal Co. v. T. L. James & Co.*, 69 So. 2d 630 (Ct. App. La. 1954).

Appellees now ask this Court to overrule decisions on which American business has placed reliance for over half a century. So serious a step calls for a showing of most compelling reasons. As will be shown in B and C below, nothing approaching such a showing has been made.

Maine—*F. S. Royster Guano Co. v. Cole*, 115 Me. 387, 99 Atl. 33 (1916).

Massachusetts—*Remington Arms Co. v. Leckmere Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959).

Michigan—*Cleveland Cooperage Co. v. Detroit Milling Co.*, 235 Mich. 57, 209 N. W. 144 (1926).

Minnesota—*Weco Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. Minn. 1960).

Mississippi—*Smith v. J. P. Seeburg Corp.*, 192 Miss. 563, 6 So. 2d 591 (1942).

Missouri—*Superior Concrete Accessories, Inc. v. Kemper*, 284 S. W. 2d 482 (Sup. Ct. Mo. 1955).

New Hampshire—*Pennsylvania Rubber Co. v. Brown*, 83 N. H. 336, 143 Atl. 703 (1928).

New Mexico—*Abner Mfg. Co. v. McLaughlin*, 41 N. M. 97, 64 P. 2d 387 (1937).

New York—*Brooks Transp. Co. v. Hillcrea Export & Import Corp.*, 106 N. Y. S. 2d 868 (Sup. Ct. N. Y. 1951).

Ohio—*McClarran v. Longdin-Brugger Co.*, 24 Ohio App. 434, 157 N. E. 828 (1926).

Oklahoma—*Sooner Beverage Co. v. Heileman Brewing Co.*, 194 Okla. 252, 150 P. 2d 72 (1944).

Rhode Island—*Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958).

South Carolina—*State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946).

South Dakota—*Wyman, Partridge Holding Co. v. Lowe*, 65 S. D. 139, 272 N. W. 181 (1937).

Utah—*William C. Moore & Co. v. Sanchez*, 6 Utah 2d 309, 313 P. 2d 461 (1953).

Vermont—*Aetna Chem. Co. v. Spaulding & Kimball Co.*, 98 Vt. 51, 126 Atl. 582 (1924).

Washington—*Portland Ass'n of Credit Men, Inc. v. Earley*, 42 Wash. 2d 273, 254 P. 2d 758 (1953).

West Virginia—*United Shoe Repairing Mach. Co. v. Carney*, 116 W. Va. 224, 179 S. E. 813 (1935).

Wisconsin—*Bulova Watch Co. v. Anderson*, 270 Wisc. 21, 70 N. W. 2d 243 (1955).

Wyoming—*Creamery Package Mfg. Co. v. Cheyenne Ice Cream Co.*, 55 Wyo. 277, 100 P. 2d 116 (1940).

B. The Court Below and the Appellees Have Confused Two Entirely Separate Lines of Constitutional Decisions.

The only reason given by the court below for disregarding the controlling decisions of this Court on the constitutional issue is the mistaken notion that the "trend and philosophy of the more recent cases" in this Court indicate an abandonment of its prior rulings. This error evidently stemmed from the court's failure to distinguish between the cases forbidding state regulation or taxation of the right to engage in interstate commerce and the entirely different body of decisions which have long permitted state police power regulation of essentially local matters having an incidental effect on interstate commerce. See *Shafer v. Farmers Grain Co.*, 268 U. S. 186, 199 (1925).

The only case cited by the court below as showing this "trend" was *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959). But that case, while upholding state taxation of the net income of foreign corporations in interstate commerce, reiterated the Court's adherence to the rule that the privilege of engaging in interstate commerce cannot be taxed under any circumstances. The Court stated:

"This Court has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a state, and that the assertion of state power to tax the 'privilege' is therefore a forbidden attempt to 'regulate' interstate commerce." (358 U. S. at 464)

This rule had long prevailed even before it was so unequivocally restated in *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951) and has been applied many times since, as for example in a case decided on the same day as the *Portland Cement* case. *Railway Express Agency v. Virginia*,

358 U. S. 434 (1959). It was repeated once again only last Term. *Scripto Inc. v. Carson*, 362 U. S. 207, 212 (1960). As the *Spector* case made clear, the assertion of state power over the privilege of engaging in interstate commerce is invalid regardless of the burdensomeness of the particular imposition:

“Neither the amount of the tax nor its computation need be considered by us in view of our disposition of the case. The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for the protection given by the State.” (340 U. S. at 607)

State regulation of local matters incidentally affecting interstate commerce stands on a different footing. State health, safety and welfare regulation of matters of vital local concern, directed at particular abuses or conditions within the state, has always been upheld when its effect was not unduly burdensome on interstate commerce. Local legislation of this kind cannot be invalidated merely because of incidental effects on interstate commerce, since virtually all state police regulation has some such effects. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938). Even in this area, if the effects on interstate commerce are unduly burdensome or discriminatory, the regulation is invalid—particularly if alternative measures are available to meet the state’s need. *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959); *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951).

Contrary to the implication of the court below, this constitutional view of local police regulation is not a recent trend, but has prevailed from the earliest times.

In the *Crutcher* case itself the Court stated:

“It is also within the undoubted province of the state legislature to make regulations . . . with regard to

all operations in which the lives and health of the people may be endangered, even though such regulations affect to some extent operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid." (217 U. S. at 61)

Cases cited by appellees in their motions to dismiss this appeal further illustrate these areas of permissible local regulation. *Panhandle Eastern Pipe Line Co. v. Michigan Commission*, 341 U. S. 329 (1951) and *Robertson v. California*, 328 U. S. 440 (1946) involved state regulation of particular industries vitally affecting the welfare of local citizens and traditionally subject to close state supervision and licensing—local gas sales and insurance solicitation.

In the *Panhandle* case the Court emphasized that the state regulation was concerned only with an "essentially local" aspect of the interstate pipeline business—direct sales requiring the utilization of local facilities in competition with a local public utility regulated by the state. The right of the pipeline company to enter the state to sell in interstate commerce to the local utility was not questioned. As to the local industrial sales, however, the Court pointed out that under the Natural Gas Act, §1(b), 52 Stat. 821 (1938), 15 U. S. C. §717 (1958), "direct sales for consumptive use were designedly left to state regulation." (341 U. S. at 334)

In the *Robertson* case, licensing of foreign insurance companies and their agents was part of a statutory scheme for the regulation of local insurance sales which was "designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp

practice.”* (328 U. S. at 447) The Court based the state's power to license foreign insurance companies on its exclusionary power over “fraudulent or unsound insurance,” which it analogized to the long-recognized police power to exclude diseased cattle and other dangerous commodities. (328 U. S. at 459) Since the states have no exclusionary power over interstate commerce as such, state regulation of the *Robertson* type, aimed at a particular evil in a particular industry, is not comparable to the power asserted by New Jersey here to license any and all interstate commerce by any and all foreign corporations.

South Carolina State Highway Dep't v. Barnwell Bros., 303 U. S. 177 (1938), also cited in the motions to dismiss, dealt with a safety regulation limiting the size and weight of vehicles on state highways, a plain exercise of the police power of the state. As this Court pointed out: “Few subjects of state regulation are so peculiarly of local concern as is the use of state highways.” (303 U. S. at 187) It was stressed that the highway regulation permissibly encompassed interstate commerce “because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.” (303 U. S. at 189) The Court also emphasized that the fundamental test of state power under the Commerce Clause was whether “the state legislature in adopting regulations such as the present has acted within its province.” (303 U. S. at 190) It has never been considered within the province of

* Insurance had long been regulated by the states, and Congress expressly provided that such regulation should continue as to interstate companies following the decision in *United States v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533 (1944). McCarran Act, 59 Stat. 33 (1945), 15 U. S. C. §1011 (1958). As indicated in the *South-Eastern Underwriters* case, in view of the long history of state regulation in this instance its continuance might have been permitted even in the absence of the McCarran Act. (322 U. S. at 548-49)

a state legislature to decide whether corporations shall engage in interstate commerce within the state. *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

The distinction between state licensing of interstate commerce and state police regulation was recently stressed by this Court in *Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U. S. 77 (1958). There this Court denied to the City of Chicago the power to license connecting motor vehicle service between railroad terminals, an integral part of interstate transportation authorized by federal legislation, while recognizing that the city could regulate the operation of the vehicles and subject them to traffic and safety laws. (357 U. S. at 88) Similarly appellant here does not claim immunity from state police regulation, but merely asserts that its right to carry on interstate commerce in New Jersey is not subject to "leave from local authorities." (*Id.* at 87)

The prohibition against direct regulation of interstate commerce by the states remains fundamental. The Court stated as a basic premise of its decision in *Portland Cement* that the Commerce Clause "requires that interstate commerce shall be free from any direct restrictions or impositions by the States." (358 U. S. at 458) In a nation where powers are divided between the national and state legislatures, it is essential to orderly government that each adhere to its own sphere of legislative action. The Court has always insisted upon the necessity of immunizing the right to engage in interstate commerce from state regulation or taxation, although it has been equally steadfast in permitting the states to achieve their legitimate objectives through regulation utilizing proper constitutional channels. In the present case the state is acting outside its constitutional province, and unnecessarily, since its objective in so doing is one which, as will be shown, this Court has already enabled it to attain in other ways.

C. Application of Qualification Statutes to Interstate Business Serves No Legitimate State Interest But Does Burden Interstate Commerce.

The reason for enactment of the New Jersey statute, which dates from 1894, was to subject foreign corporations to the jurisdiction of state courts, and it was predicated on the state's power "to exclude foreign corporations, or to admit them within its borders upon conditions." *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 412, 60 Atl. 822, 828 (Ch. 1905). This power to exclude has, of course, long been inapplicable to corporations in interstate commerce and the need for rendering foreign corporations amenable to suit by means of such statutes has disappeared because of the ease with which corporations such as appellant are suable under the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945). As a result, to apply the statute today to bar a foreign corporation such as appellant from state courts is to deny justice to the corporation even though it could have been sued in the state courts.*

The court below, not perceiving that this is the true relevance of *International Shoe*, asserted that if "minimum contacts" are sufficient to give state courts jurisdiction in suits against a foreign corporation, they must also warrant application of a state qualification statute to a foreign corporation even though engaged only in interstate commerce.

Such reasoning disregards nearly fifty years of constitutional history. This Court pointed out the important

* This result has been described as follows: "You can't sue me since you didn't qualify so as to insure that I could sue you; but even though you didn't qualify, I can sue you." Note, 33 Ind. L. J. 358, 370 (1958). It should be noted that in diversity cases the federal courts would also be closed. *Woods v. Interstate Realty Co.*, 337 U. S. 535 (1949).

constitutional difference between service-of-process cases and qualification cases in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 587-88 (1914). In that case, only four years after the *Pigg* decision, the Court held that a foreign corporation, even though engaged only in interstate commerce and therefore not subject to the Kentucky qualification statute, was nevertheless sufficiently "present" in the state to be served with process and sued in the courts of the state.

The highest courts of other states have long recognized that a foreign corporation in interstate commerce may be subject to suit in state courts even though the state could not require it to qualify to do business. *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917); *State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946).

In so holding in the *Tauza* case, Judge (later Mr. Justice) Cardozo said (220 N. Y. at 267, 115 N. E. at 917):

"In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here (*International Text Book Co. v. Pigg*, 217 U. S. 91)."

In the *Ford Motor* case, the highest court of South Carolina likewise held that a foreign corporation doing interstate business in South Carolina could not be subjected to a penalty for failure to qualify as a foreign corporation although the court held in the same case that the corporation was subject to the process of the state court in the state's suit to collect the penalty.

The basis of the amenability of foreign corporations to state court jurisdiction has evolved from a "presence" test

into the broader "minimum contacts" test of the *International Shoe* case and *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957). Under the rule of these cases foreign corporations are now so easily subjected to state court jurisdiction that the states have no need for qualification statutes to enable their citizens to sue foreign corporations in state courts. Nor is the New Jersey statute necessary to accomplish service of process, since New Jersey court rules provide for service on any servant of a foreign corporation, and when this is not possible, by registered mail addressed to the principal office of the foreign corporation. N. J. Rev. Rules 4:4-4(d).

The State of New Jersey, which intervened in this case to defend the constitutionality of the statute, made no attempt to justify it on the ground for which it was enacted. Rather, it sought to defend the statute as a means of permitting the state to be apprised of the presence of foreign corporations for tax purposes.

This is indeed flimsy support. If deference is to be accorded a state statute it should at least be on the basis of the legislative judgment as to its need and purpose, not on an extraneous administrative use which the ingenuity of counsel finds for it. See *Sprout v. South Bend*, 277 U. S. 163, 169 (1928). The state's newly conceived defense of the statute has no support in the record or in the decisions of the New Jersey courts in the present case or otherwise. If the legislature seeks information regarding foreign corporations to implement its tax and regulatory measures it can require tax returns and other reports.* But the

* It already does so. For example, the New Jersey Tax Bureau requires a return to be filed whenever a corporation is doing business within the state. N. J. Corporation Tax Regs. 16:10-1.130. Similarly, the New Jersey Unemployment Compensation law contains express requirements enforced by penalties, for the filing of reports and returns, and the agency implementing this law has power to require additional reports. N. J. REV. STAT. 43:21-14.

state cannot condition the right to engage in interstate commerce on compliance with such regulations. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888); *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954). Nor can the state enforce such regulations by denying access to state courts to corporations in interstate commerce. *Furst v. Brewster*, 282 U. S. 493 (1931).

Consideration having been given to the qualification statute from the point of view of the state, which has no need for its application to a foreign corporation in interstate commerce, an examination is appropriate from the viewpoint of the corporation. For the corporation compliance does indeed have burdensome aspects.

By being forced to give a general consent to suit through appointment of an agent for the service of process, the corporation may subject itself to suits not falling within the "minimum contacts" rule, as, for example, suits by non-residents on causes of action arising outside the state. Absent such consent, this Court has on several occasions stricken down as a burden on interstate commerce the assertion of state jurisdiction in such cases. *E.g.*, *Davis v. Farmers Co-op. Equity Co.*, 262 U. S. 312 (1923); see Note, 73 HARV. L. REV. 960, 983-87 (1960). It follows that a statute which forces corporations engaged in interstate commerce to consent in advance to such suits conflicts with the Commerce Clause. *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914). Since under the Court's recent pronouncements a state can obtain jurisdiction on behalf of its citizens in all instances where it is fair to do so, there is no justification for requiring foreign corporations in interstate commerce to consent to additional jurisdiction that interferes with that commerce.

The cumulative effect of compliance with the numerous and varied requirements of qualification statutes can be

additionally burdensome to foreign corporations that do business in a number of states. There are many different requirements, varying from state to state, as to restrictions on corporate name, types and amounts of fees, and classifications of data to be furnished. Most statutes not only require the initial submission of corporate charters and other documents and data but also, like New Jersey, require the filing of periodic reports of one kind or another, thus imposing a recurring burden.

The very fact that a certificate of authority has been obtained from a state is likely to be used as a pretext for taxation by the state. For example, New Jersey asserts that a foreign corporation "holding a general certificate of authority to do business in this state issued by the Secretary of State" automatically acquires a taxable status and is required to file a return and pay a franchise tax.* If it is once established that foreign corporations in interstate commerce can be required to obtain the state's authority to do business, it can be expected that additional requirements will be enacted and further burdens imposed.

In sum, the State of New Jersey in this case has imposed a direct regulation on the right to engage in interstate commerce. It would be ironic for this Court, after having consistently invalidated such statutes in the past, to apply a different rule here where the statute serves no legitimate state need and burdens interstate commerce.

Bureau 3:10-1.130 of the New Jersey Corporation Tax follows:

"Every corporation, not expressly exempted, is deemed to have (or to have acquired) a taxable status under the act and is required to file a return and pay a tax thereunder, if it falls within any one of the following categories: • • •

"(b) if a foreign corporation,

"(1) holding a general Certificate of Authority to do business in this state issued by the Secretary of State;
• • •"

II.

Appellees' New Argument that Appellant's Business in New Jersey is Partly Intrastate is Without Foundation.

The constitutional issue discussed in Point I is the only genuine issue in this case. It is the issue on which the court below decided the case and the sole question presented by appellant in its Notice of Appeal and Jurisdictional Statement. However, in their motions in this Court to dismiss this appeal, appellees attempted to avoid that issue by advancing the new argument that the business appellant does in New Jersey is partly intrastate. This contention is not only an afterthought, but even if true would not justify affirmance of the decision below.

Since the present suit is vitally related to appellant's interstate business, it is one that appellant has the right to bring even if it were also doing some intrastate business. *Furst v. Brewster*, 282 U. S. 493 (1931); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); see *Crutcher v. Kentucky*, 141 U. S. 47, 59 (1891). Appellant's fair trade enforcement at the retail level is an integral part of its interstate operations, as recognized by a decision of the Supreme Court of New Jersey itself in a case involving a similar fair trade program. *Johnson & Johnson v. Weissbard*, 11 N. J. 552, 95 A. 2d 403 (1953).*

* The courts of all other states which have passed on the point are in accord: *Remington Arms Co. v. Lechmeré Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959); *Weco Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. Minn. 1960); *Seagram Distillers Co. v. Corenswet*, 198 Tenn. 644, 281 S. W. 2d 657 (1955); *Fromm & Sichel, Inc. v. Zimmerman*, 1956 CCH Trade Cases, par. 68,362 (D. Ill. 1956); *Ronson Corp. v. Macher Jewelry & Watch Corp.*, 1955 CCH Trade Cases, par. 68,193 (N. Y. Sup. Ct. N. Y. Co. 1955); *Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958); *Bulova Watch Co. v. Anderson*, 270 Wisc. 21, 70 N. W. 2d 243 (1955); *Sunbeam Corp. v. Grayson-Robinson Stores, Inc.*, 1953 CCH Trade Cases, par. 67,499 (Super. Ct. Cal. 1953). This Court has itself held that fair trade pricing by an interstate seller is a part of the interstate marketing arrangement. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951).

In addition to the irrelevance of the argument, there is no basis in the record for contending that appellant does any intrastate business.

A. The Contention that Appellant is Engaged in Intrastate Commerce is Not Properly Before the Court.

The whole thrust of the appellees' argument below was that the New Jersey statute, which by its terms requires qualification before transacting "any business" in the state, encompasses business solely in interstate commerce, and that there is no longer any federal constitutional barrier to the application of the statute to interstate business. In adopting the appellees' contention, the court below similarly did not question that appellant is engaged entirely in interstate commerce in New Jersey. The court not only referred to appellant's sales as being only in interstate commerce but devoted an entire section of its opinion to the constitutional question premised on the fact that appellant was "engaged entirely in interstate commerce" (R. 38-41).

The finding that appellant was "doing business" in New Jersey referred to the regularity and continuity of appellant's activity in the state. There is no basis for suggesting that this finding implies the doing of intrastate business. The court clearly did not so intend, as it would not even have reached the constitutional issue if it had found that appellant was doing intrastate business. In *International Textbook Co. v. Pigg*, 217 U. S. 91, 103-06 (1910), this Court agreed with the state court's finding that a corporation was "doing business" in the state, but held that the business the corporation was doing was entirely interstate. Similarly in *Buck Stove Co. v. Vickers*, 226 U. S. 205, 214 (1912), the Court found that the cor-

porations involved "were doing business in Kansas—a purely interstate business".

There being nothing in the opinion below to support the contention that appellant is engaged in intrastate commerce in New Jersey, it is clear that the new point sought to be raised by appellees in their motions to dismiss was an attack on the finding of the court below. That the appellees' contention is a new one in this Court is underscored by the fact that the only case cited to support it in the motions to dismiss was one not cited below by either appellee or the court—*Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918).

Having persuaded the courts below that the New Jersey statute applies to appellant's exclusively interstate activities, appellees apparently hoped to convince this Court that the decision below was right on the entirely different ground that appellant is engaged in intrastate commerce. In view of appellees' contentions below, accepted by the New Jersey courts, it is not now open to them to question the underlying factual basis of the court's decision of the constitutional question. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 434-35 (1907). This would inject a new question on appeal, which this Court has consistently refused to allow. *E. g.*, *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 38-39 (1913); *Blair v. Oesterlein Mach. Co.*, 275 U. S. 220, 225 (1927); *Knetsch v. United States*, 29 U. S. L. WEEK 4018, 4020 (U. S. Nov. 14, 1960).

B. Appellant's Activities in New Jersey are Part of its Interstate Business.

Even if the question were open, there is no basis for holding that appellant is engaged in intrastate commerce in New Jersey. Appellant sells its products in New Jersey entirely in interstate commerce to wholesale distributors

under contracts made in Indiana. It has no warehouse or stock of goods in New Jersey and makes no local sales. All of its New Jersey revenues are from interstate sales, and all of its activities in the state contribute to these interstate sales.

In contending in their motions to dismiss that appellant is engaged in intrastate commerce in New Jersey, appellees devised a highly technical argument based solely on the *Cheney* case, an excise tax case which did not even involve the legal question presented here—qualification and access to courts.* That case involved several companies, and the decision relied on by the appellees related to Northwestern Consolidated Milling Company, which was held to be doing a local business subject to taxation. (This part of the case will be referred to as the *Northwestern Consolidated* decision.)**

There are salient factual differences between the *Northwestern Consolidated* decision and the present case. There, as appears more fully in the opinion of the Supreme Judicial Court of Massachusetts, which this Court affirmed, the corporation had actually qualified to do a local business in accordance with the Massachusetts qualification statute. (218 Mass. 558, 562, 106 N. E. 310, 311 (1914)*** It main-

* It has long been recognized that the courts have had less difficulty in finding a business local for purposes of state taxing power than for purposes of qualification statutes. Isaacs, *An Analysis of Doing Business*, 25 COL. L. REV. 1018, 1025 (1925). This stems from the policy that "interstate business must pay its way." *Postal Tel-Cable Co. v. Richmond*, 249 U. S. 252, 259 (1919); cf. *McGoldrick v. Berwind White Co.*, 309 U. S. 33 (1940).

** The *Cheney* case is best known for the decision regarding the Cheney Brothers Company. That company had an office in Massachusetts where it maintained a stock of samples and a sales force taking orders for interstate sales. This Court, in invalidating a Massachusetts tax on the Company, held that these activities were in interstate commerce. That ruling supports the appellant's position here.

*** The case in the state court is reported under the name *Marconi Wireless Tel. Co. v. Massachusetts*.

tained an office in Boston which had "charge of the business of the company in New England and a part of New York." This office received and accepted orders from wholesalers and also kept on hand a stock of goods from which local sales were made. (218 Mass. at 575, 106 N. E. at 317.) In addition, the Massachusetts court found:

"The major part of the petitioner's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in soliciting orders from domestic retailers. This is in substance the business of providing agents for the wholesalers." 218 Mass. at 575, 106 N. E. at 317 (emphasis supplied).

In contrast to the activities of Northwestern Consolidated, appellant accepts no orders in New Jersey and keeps no stock of goods there. It maintains no general business office in the state. Rather, an employee rents an office from which he supervises the promotional activities of appellant's detail men. These detail men do not solicit orders nor do they act as agents for any domestic concern. Their sole function is to promote the products appellant sells in interstate commerce. Such promotion, even when accompanied by active solicitation within the state, has been held a part of interstate commerce so repeatedly that elaboration of the point is unnecessary. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (1887); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 437 (1938). See also the many cases on the point cited in *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 392 (1952).*

Apparently the straw at which the appellees grasp in seeking to assimilate this case to the *Northwestern Consolidated* decision is the fact that the appellant's detail men, as

* Advertising by a manufacturer of products sold by it in interstate commerce is a part of that commerce even though designed to stimulate sales at the retail level. *Ford Motor Co. v. FTC*, 120 F. 2d 175, 179 (6th Cir. 1941).

a courtesy to a retailer, occasionally receive and transmit to a wholesaler an unsolicited order of the retailer. This incidental circumstance is too trivial and insubstantial to localize the essentially interstate character of appellant's business in New Jersey and was plainly regarded as immaterial by the court below. (R. 34-5) *Cf. Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 461 (1959). This is a far cry from the systematic furnishing of salesmen to act as agents for local wholesalers in the active solicitation of retail orders, which was found to constitute the major part of the business of Northwestern Consolidated.

It is clear from the *Portland Cement* case that if the *Northwestern Consolidated* decision still represents the law at all, it is strictly limited to its own facts. In *Portland Cement* one of the corporations involved had salesmen in the state who, in addition to soliciting direct interstate sales, solicited orders which were turned over to local dealers who in turn purchased from the corporation. The activities of the corporation in the state were nevertheless held to be entirely in interstate commerce. (358 U. S. at 454-55) Moreover, Public Law 86-272, 73 Stat. 555 (1959), enacted by Congress after the *Portland Cement* decision, exempts from state taxation income derived from the solicitation of such orders, as well as from the solicitation of direct interstate orders. The classification of such activity as interstate commerce, because of its importance to interstate sales, was a principal objective of the Act. S. REP. No. 658, 86th Cong., 1st Sess. (1959).

The court below addressed itself to the real issue in this case. It recognized that only interstate commerce was involved but thought that cases such as *Portland Cement* and *International Shoe* changed the rule of the *Pigg* line of cases. In this it was clearly wrong, as has been shown in Point I. Appellees' attempt as an afterthought to redeem that error by arguing that that issue was not even before the court is as lacking in substance as it is in timeliness.

Conclusion.

The decision below disregards a constitutional rule that is as sound today as when it was formulated. The doctrine of the *Crutcher* and *Pigg* cases has encouraged the free flow of interstate commerce without hampering the legitimate interests of the states. The principle that interstate commerce is not a privilege granted by the state has been accepted by all the states, including New Jersey until this case, and has been relied upon by corporations all over the country in formulating their business policies and methods. To hold now that interstate corporations large and small can be required to comply with 50 different sets of state corporation laws, with their varying requirements as to filing of reports, payment of fees and taxes and subjection to jurisdiction, would place an intolerable and unnecessary burden on interstate commerce.

The judgment below, being clearly erroneous, should be reversed.

Respectfully submitted,

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APPENDIX.

Sections of New Jersey Revised Statutes Involved.

14:15-3.

"Copy of charter and statement to be filed; certificate of authority to do business. Every foreign corporation, except banking, insurance, ferry and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal; and a statement attested in like manner setting forth:

"a. The amount of its authorized capital stock and the amount actually issued;

"b. The character of the business which it is to transact in this state; and

"c. The principal office of the corporation in this state and the name and place of abode of an agent upon whom process against such corporation may be served, which agent shall be a domestic corporation or a natural person of full age actually resident in this state, and the agency shall continue until the substitution, by writing, of another agent.

"Thereupon the secretary of state shall issue to the corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and he shall keep a record of all such certificates issued."

14:15-4.

"Certificate of authority to do business prerequisite to suits on contracts. Until such corpora-

tion so transacting business in this state shall have obtained such certificate of the secretary of state, it shall not maintain any action in this state upon any contract made by it in this state."

14:15-5.

"Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations. When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind, shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

14:15-6.

"Penalty for failure to obtain certificate of authority to do business. Every foreign corporation transacting any business, directly or indirectly, in this state, without having first obtained authority therefor, as provided in section 14:15-3 of this title, shall for each offense forfeit to the state the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the attorney general in the name of the state."

14:15-7.

“Surrender of privileges and franchises; certificate issued by Secretary of State. Any foreign corporation which shall have received a certificate authorizing it to transact business in this State may surrender the rights, privileges and franchises conferred upon it by the certificate and withdraw from this State by filing with the Secretary of State (1) a copy of the resolution of its board of directors authorizing such surrender and withdrawal, certified to be a true copy under the hand of the secretary of the corporation and the seal of the corporation, (2) a copy of a certificate of dissolution, issued by the appropriate official of the state of domicile of the foreign corporation, certified to be a true copy under the hand of the official and his official seal, or (3) a copy of an order or a decree of dissolution, made by any court of competent jurisdiction of the state of domicile of the foreign corporation, certified to be a true copy under the hand of the clerk of the court and his official seal. Upon the filing of any such certificate the Secretary of State shall issue a certificate under his hand and official seal evidencing the surrender of the rights, privileges, and franchises conferred upon the foreign corporation and its withdrawal from the State.”

14:16-1.

“Fees of Secretary of State. On filing any certificate or other papers relative to corporations in the office of the Secretary of State, there shall be paid to the Secretary of State for the use of the State, fees and taxes as follows: • • •

Copy of charter and statement of foreign corporation and issuing certificate of authority to transact business, ten dollars.”

14:6-2.

"Annual report to Secretary of State. Every domestic and every foreign corporation doing business in this State shall file in the office of the Secretary of State, within thirty days after the first election of directors and officers, and annually thereafter, within thirty days after the time appointed for holding the annual election of directors, a report authenticated by the signatures of the president and one other officer, or by any two directors, stating:

- a. The name of the corporation;
- b. The name of the municipality, street and number, if number there be, of its registered office in this State, and the name of the agent upon whom process against the corporation may be served;
- c. The character of its business;
- d. The amount of its authorized capital stock, if any, and the amount actually issued and outstanding;
- e. The names and addresses of the directors and officers of the company and when the term of office of each expires;
- f. The date appointed for the next annual meeting of the stockholders for the election of directors; • • •

If the report is not so made and filed the corporation shall forfeit to the State two hundred dollars (\$200.00), to be recovered with costs in a civil action, to be prosecuted by the Attorney-General, who shall prosecute such actions whenever it shall appear that this section has been violated. • • •"